Supreme Court, U.S.
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In The
Supreme Court Of The United States
October Term, 1994

THE ASSOCIATION FOR RETARDED CITIZENS OF CONNECTICUT, INC., ET AL.

Petitioner,

v.

GARETH THORNE, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Court of Appeals' decision substantially undermine the public interest in resolving institutional reform litigation through consent decrees?

PARTIES TO THE PROCEEDING

The following are named as parties to the proceeding in the Court of Appeals for the Second Circuit:

THE ASSOCIATION FOR RETARDED CITIZENS OF CONNECTICUT, INC.,

WILLIAM BRILLA, by his parents and next friends, Mr. and Mrs. Anthony Brilla,

ANN MARIE OLENICK, by her mother and next friend, Mrs. Robert Olenick,

MARIE JENNIE FORTIN, by her father and next friend George Fortin,

CHERYL EATON, by her mother and next friend, Ruth Eaton,

ALLAN RICCARDI, by his mother and next friend, Helen Riccardi,

DAVID MELI, by his mother and next friend, Alicia Meli,

JOSEPH RITTLINGER, by his parents and next friends, Mr. and Mrs. Adam Rittlinger,

GARY ROTONTO,

STEPHEN OGREN,

TINA SANDAHL, by her parents and next friends, Mr. and Mrs. Eric Sandahl,

PHILIP TEITELMAN, by his parents and next friends, Mr. and Mrs. Samuel Teitelman,

KRISTINA ARNOLD, by her parents and next friends, Mr. and Mrs. Theodore Arnold,

LISA FRENCH, by her mother and next friend, Carolyn Bullard,

STEPHEN BENSON, by his father and next friend, Robert Benson,

MANSFIELD PARENTS ASSOCIATION,

v.

GARETH THORNE, Commissioner,

Connecticut Department of Mental Retardation, COMMISSIONER,

Connecticut Department of Social Services, COMMISSIONER,

Connecticut Department of Children & Families,

Commissioner, Connecticut Department of Public Health & Addiction Services,

United States of America, litigating Amicus Curiae.

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Conn. Gen. Stat. § 3-125
Conn. Gen. Stat. § 17a-238(g)
Conn. Gen. Stat. § 19a-571

Other Authorities:

3 Moore's Federal Practice, ¶ 24.18[3]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, The Association for Retarded Citizens of Connecticut, Inc. et al, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit which entered in this case on July 25, 1994.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix 1, and is reported at 30 F.3d 368.

The opinion of the District Court for the District of Connecticut has not been reported. The opinions of the Magistrate Judge and the District Court are reproduced in Appendices 2 and 6.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 25, 1994. This petition is filed within ninety days from the judgment of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In order to determine whether the orders below are proper, it is necessary to consider the below listed statutory provisions.

28 U.S.C. § 1343(a)(3)	C.G.S. § 3-125
28 U.S.C. § 1367(a)	C.G.S. § 17a-238(g)
28 U.S.C. § 1651(a)	C.G.S. § 19a-571

STATEMENT OF THE CASE

This case was filed in December 1978 by twelve individual plaintiffs and the Connecticut Association for Retarded Citizens to challenge the quality of care, living conditions, programming and service and placement of some 1200 individuals with mental retardation living at Mansfield Training School ("MTS") or who had been transferred from MTS to nursing homes. The defendants included the Commissioner of the Connecticut Departments of Mental Retardation ("DMR"), Social Services, now known as the Department of Income Maintenance ("DIM") and the Connecticut Department of Health Services, now the Connecticut Department of Public Health and Addiction Services ("DHS").[1] In 1980 the district court

[1]The Court of Appeals decision, Association for Retarded Citizens v. Thorne, 30 F.3d 367, 368 (2d Cir. 1994) is attached as Appendix 1 ("A1").

certified a plaintiff class consisting of residents of MTS and persons who had been transferred to nursing homes yet remained Mansfield's responsibility. A1, p. 4. In 1982 the district court dismissed DHS from the suit on the ground that it was not essential to resolve the issues then before the court. A1, p. 4.

On April 9, 1984 the magistrate judge to whom the case had been referred by the district court approved a consent decree which provided for a planning process through which the needs of each classmember would be identified and addressed. A1, pp. 4, 5. In the years that followed many disputes over the interpretation and implementation of the Consent Decree were resolved, either through settlement or adjudication on the merits. A1, p. 5.

On November 14, 1990 the district court entered a "Final Order" establishing

a framework for the ultimate resolution of the case. A1, p. 5. The Final Order reiterated portions of the Consent Decree, but also included new provisions relating to numerous settlements and court orders entered into between 1984 and 1990. A1, p. 5. One of the new provisions, contained in paragraph XI.J, provides in relevant part that:

> The DMR shall continue to enforce and seek full implementation of DMR Medical Advisory # 87-2 (regarding withholding of cardiopulmonary resuscitation for terminally ill DMR clients) with respect to all classmembers.

Medical Advisory # 87-2 ("Advisory") was adopted by DMR in 1987 because a client's retardation was often a factor in determining how much medical care he received.[2] The Advisory recognizes that, even thought retarded persons may never be competent to write a living will, they may

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[2]Medical Advisory # 87-2 is attached in Appendix 3 ("A3").

suffer from a terminal illness which has reached a stage at which "cardiopulmonary resuscitation ["CPR"] after cessation of respiration and cardiac function would be unwarranted." A3, pp. 66, 67. The Advisory establishes a procedure through which DMR will review proposed DNR Orders before they may be written in the medical chart of a DMR client. A3, pp. 71-73. The Advisory provides further that DMR has no authority under Connecticut law to approve the use of DNR Orders. A3, p. 71. The Advisory provides that DNR Orders are appropriate only when the client's attending physician determines that the client is terminally ill, has requested a second opinion regarding the client's terminal illness from a Connecticut licensed physician in the appropriate specialty and has presented the client's medical condition to the client's surrogate decisionmaker for final

approval. A3, pp. 71, 72. "Terminal illness" under the Advisory is an incurable or irreversible medical condition that will bring about the client's death within "days or weeks". A3, pp. 68.[3] If a client's attending physician cannot state that the client will probably die within "days or weeks," the Advisory provides that the Commissioner of DMR will decide whether the DNR Order is acceptable after consulting with the Attorney General's Office. A3, p. 74.

On July 9, 1992 the plaintiffs filed a motion for preliminary injunction and a motion to join DHS as a defendant.[4] The motion for preliminary injunction sought

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[3]This definition is virtually identical to those established by the Connecticut Legislature in § 17a-238(g) and 19a-571 of the Connecticut General Statutes.

[4]The plaintiffs Motion for Preliminary Injunction and Further Orders is Attached in Appendix 4 ("A4").

to require DHS to cooperate with DMR in the implementation of the Advisory in health care facilities licensed by DHS. A4, p. 76. Plaintiffs asserted that from time to time some classmembers were transferred to health care facilities licensed by DHS, such as hospitals and nursing homes, which did not abide by the Advisory. A1, p.6. Those facilities instead follow the DHS policy of allowing DNR Orders when an attending physician determines that it is in the patient's best interests and has received the consent of the patient's surrogate decisionmaker. A1, p.8. The court issued a show cause order summoning DHS to appear in court to show cause why a preliminary injunction should not issue enjoining DMR and DHS to cooperate in establishing uniform standards and procedures to protect the rights of classmembers in DHS licensed facilities under the Due Process

Clause of the United States Constitution and the Final Order of the district court.[5] DHS appeared, presented evidence and cross-examined witnesses during the four-day trial on the plaintiffs' motion.[6] A2, p. 40.

The evidence adduced at the hearing establishes that there is considerable confusion over the scope and effect of Do Not Resuscitate Orders. A2, p. 24. DNR Orders are written for incompetent classmembers living in DHS-licensed facilities long before the onset of terminal illness, A2, p. 57, and consented to by unrelated guardians. A2, p. 57. As a result, no affirmative action is taken when a patient experiences respiratory or

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[5]The Order To Show Cause is attached in Appendix 5 ("A5").

[6]The Ruling on Motion for Preliminary Injunction and Recommended Ruling on Motion to Join Third Party Defendant is attached in Appendix 2 ("A2").

cardiac distress. A2, p. 57. Classmembers face grave risks as a result of such orders. One classmember, Gail Johnson, died when a DNR Order written in violation of the Advisory was implemented by a nursing home. A2, pp. 32, 33.

The district court found that Medical Advisory # 87-2 is followed when classmembers are housed in DMR licensed facilities, A2, pp. 42, 43, but that these protections vanish when they are transferred to DHS-licensed nursing homes or hospitals. A2, p. 47. DHS ignores the Advisory and DMR claims it has no authority over DHS licensed facilities. A2, pp. 47, 48.

The district court ruled that "joinder of DHS is essential to ensure that the protections in the Final Order are not forfeited ... when one state agency, DMR, chooses to place a classmember in a facility licensed by

another state agency, DHS." A2, pp. 42, 43. Although the district court's decision purports to rule on plaintiffs' Motion to Join Defendants it does not mention Federal Rules 19 and 20. See 30 F.3d at 370. Rather, the court joined DHS under the All Writs Act, 28 U.S.C. § 1651(a), because it found that DMR could not effectively enforce the Advisory in DHS licensed facilities, and DHS took the position it was not bound by the Advisory because it was not a party to the litigation. A2, pp. 41-43. The court held that the actions of DMR and DHS violated classmembers' rights to Due Process of law and to life secured by the Fourteenth Amendment to the United States Constitution. A2, pp. 48-62. The court also held that the actions of DMR and DHS violated paragraph XI.J of the Final Order. A2, pp. 48. The court ordered DMR and DHS to submit a remedial plan with all

deliberate speed. A2, pp. 63, 64.

The Recommended Ruling of the Magistrate Judge was approved by United States District Judge Alfred V. Covello on August 25, 1993. A6, p.82. DHS appealed.

The Court of Appeals reversed. According to the Court, the All Writs Act may be invoked to require compliance of nonparties to ensure that its orders are not frustrated only after the district court rules on the merits of litigation. A1, p. 8. Since it found that the terms of paragraph XI.J of the Final Order were voluntarily assumed [by DMR], rather than legally imposed, the district court had no jurisdiction to enforce the provision against nonparty DHS and had no jurisdiction to invoke the All Writs Act. A1, p. 9. The Court also expressed "serious doubts as to whether Rules 19 and 20 [of the Federal Rules of Civil Procedure] would have permitted DHS's

joinder even had the Final Order resulted from an adjudication on the merits...". A1, p. 9. In the Court's view "DHS is entitled to defend the propriety of its actions in an independent suit where it is not prejudiced by the presence of extraneous claims or parties and an unrelated litigation history." A1, p. 11.

I. THE COURT OF APPEALS' DECISION RAISES ISSUES OF FUNDAMENTAL IMPORTANCE AS IT SUBSTANTIALLY UNDERMINES THE PUBLIC INTEREST IN RESOLVING INSTITUTIONAL REFORM LITIGATION THROUGH CONSENT DECREES

The Court of Appeals sharply distinguishes the power of district courts to use flexible procedures to adjudicate the extent nonparties are frustrating implementation of court orders depending on whether or not the court has ruled on the merits of civil rights violations. 30 F.3d at 370. Under the court of appeals' decision, a federal court may not order a nonparty to participate in post judgment

proceedings to determine the extent to which its policies and procedures contribute to violations of the constitutional rights of class members protected by a consent decree. The ruling deprives courts of the heretofore well-accepted power to use flexible procedures to encourage parties and nonparties to resolve conflicts voluntarily. Courts will also be unable during implementation to balance the interests of nonparties against the public interest advanced by consent decrees and the significance of the intrusion on the constitutional rights of the intended beneficiaries of the consent decree when adjudication on the merits becomes necessary. The decision leaves district courts powerless to join parties under Rules 19, 20 and 21 of the Federal Rules of Civil Procedure whenever their conduct thwarts implementation of a consent decree and violates the

constitutional rights of persons protected by the consent decree. Finally, the decision virtually prohibits district courts from employing the All Writs Act to ensure implementation of orders based on consent of the parties. Under the decision, federal courts may use flexible procedures to resolve conflicts between nonparties and parties only if the court has previously disposed of the case on the merits. The Supreme Court should review this case because the decision undermines the enforcement of consent decrees and therefore the voluntary resolution of complex civil rights cases.

A. Consent decrees in the Institutional Reform Litigation

The Court of Appeals' decision reflects a misunderstanding of the important role consent decrees play in encouraging voluntary compliance in institutional reform litigation and the

need for flexible and effective procedures to fully realize the important public interests embodied in those decrees.

Many courts of appeals have recognized important distinctions between institutional reform consent decrees and the settlement of lawsuits by private parties. While institutional reform consent decrees are similarly born by agreement between the parties, they affect more than the rights of the immediate litigants. The decrees involve far more than the parties directly involved in the suit and impact on the public's right to the sound and efficient operation of its institutions. Heath v. DeCourcy, 888 F.2d 1105, 1109 (6th Cir. 1989). In New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983), the Second Circuit stated:

[I]n institutional reform litigation

> ... judicially-imposed remedies must be open to adaptation when unforseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is presented in the adversarial setting of the courtroom. *Id.* at 969.

Several circuits have held that in institutional reform litigation, consent decrees arrived at by agreement are subject to modification whenever the court identifies a deficiency in the original decree which impedes achieving its goal because of changed circumstances. See Heath v. DeCourcy, supra.; N.Y.A.R.C. v. Carey, 706 F.2d 956, 970, 971 (2d Cir. 1983); Plyler v. Evatt, 846 F.2d 208, 212 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988); Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984); Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d 1114, 1120-1121 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

Consent decrees in institutional

reform litigation are often subject to court oversight for a considerable period of time. See Wuori v. Concannon, Civ. No. 75-80-P (D Maine, Jan. 14, 1981); In re Robert Brace, Nos. 27, 28, 44, 17, 13, 47 (Vt. Dt. Ct., Unit No. 1, Brandon Cir., Oct. 16, 1980); Michigan Association for Retarded Citizens v. Smith, 475 F. Supp. 990 (E.D. Mich. 1979); New York State Association for Retarded Children v. Carey, 393 F. Supp. 715 (E.D. N.Y. 1975); Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978); Evans v. Barry, Civ. Action No. 76-1293 (D.D.C. *supplemental consent order entered,* Feb. 13, 1983.

During the remedial phase of such litigation there is a strong likelihood that classmembers will move through the jurisdiction of various governmental agencies and their individual circumstances and those of the governmental entities named as defendants

will evolve or change. The federal district courts overseeing such litigation have a strong interest in seeing to it that classmembers are protected and the central purposes of the consent decree are achieved even though unforeseen barriers to implementation arise. Unlike cases involving settlements between private parties, the court places significant "weight and authority of the court behind the terms of the decree" in institutional reform cases. Stotts v. Memphis Fire Department, 679 F.2d 541, 557 (6th Cir. 1982), *reversed on other grounds*, 467 U.S. 561 (1983). The court, in such cases, has an affirmative duty to protect the integrity of the decree, and should have broad discretion in how to do so. *Id.*

B. The Importance of Flexible Procedures to Address Barriers To Full Implementation of the Decree

The courts have established flexible

procedures in these cases to protect classmembers' rights on the one hand, and to accommodate the rights of interested nonparties on the other. In New York State Association for Retarded Children v. Carey, 466 F. Supp. 479 (E.D.N.Y. 1978), *aff'd*, 612 F.2d 644 (2d Cir. 1979), for example, former residents of the Willowbrook Developmental Center were excluded from public schools by the New York City Board of Education ("Board") because they were infected with hepatitis B while at Willowbrook. 466 F. Supp. at 481. The defendant, Commissioner of the Office of Mental Retardation and Developmental Disabilities, acting pursuant to his authority under the Willowbrook consent decree, brought an action to enjoin the Board's exclusion of the Willowbrook children from public school. 466 F. Supp. at 481-482. The suit was promptly consolidated with

proceedings brought to enforce the consent decree approved in N.Y.A.R.C. v. Carey. Following a trial, the Board was joined as a defendant for the limited purpose of resolving the controversy. The court found that the Board violated the consent decree, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401 et seq., the Rehabilitation Act, 29 U.S.C. § 794, and the Due Process and Equal Protection Clauses of the United States Constitution. 466 F. Supp. at 486.

The court enjoined the Board from excluding children from public school based on their status as hepatitis B carriers. 466 F. Supp. at 486, 487. The court held that it had ancillary jurisdiction to decide the controversy before it under otherwise applicable rules of substantive law. 466 F. Supp. at 482. See also Equal Employment Opportunity Commission v. Local Union No. 3, 26 Fed.

R. Serv. 2d 31 (1978) (joinder of nonparties ordered under Rule 19(a) because the goals of the consent decree could not be achieved among those already parties).

The procedures followed by the district court in this case were equally reasonable and resulted in full and fair adjudication of the issues. The plaintiffs moved in the district court for joinder of DHS under Rule 19(a) of the Federal Rules of Civil Procedure and for a preliminary injunction enjoining conduct which violated classmembers' constitutional rights. See A5 and A6, pp. 76 - 81.

The district court ordered the defendant DMR and nonparty DHS to show cause why a preliminary injunction should not enter enjoining DMR and DHS to establish uniform procedures to review DNR Orders proposed for incompetent non-

terminally ill classmembers. A4, pp. 76 - 78. DHS had a full and fair opportunity at those hearings to challenge the federal constitutional basis of the underlying consent order and the findings of unconstitutionality ultimately made by the court. Faced with the necessity of acting promptly to protect classmembers from potentially life-threatening DNR Orders, the court had the supplemental jurisdiction to decide whether DHS should be joined because fundamental rights of classmembers might be irretrievably lost unless plaintiffs could assert them in the ongoing action in federal court. 28 U.S.C. § 1367(a); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978); 3B Moore's Federal Practice, ¶ 24.18[3].

Following the hearing the court determined preliminarily that DMR and DHS violated classmembers' rights to life to

not be deprived of adequate medical care without due process of law. See Youngberg v. Romeo, 457 U.S. 307, 324 (1981). Having determined preliminarily that the conduct of DMR and DHS violated classmembers' constitutional rights and that classmembers were threatened with irreparable harm, the court had jurisdiction under 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1367(a) to order DMR to submit a remedial plan and DHS to cooperate in remedial efforts. Owen Equipment & Erection Co. v. Kruger, supra.; N.Y.A.R.C. v. Carey, 438 F. Supp. 447, 446 (E.D.N.Y. 1977). In this way the court was best able to consider modifications to the Final Order necessary to balance valid concerns of DHS with the court's interest in protecting the lives of classmembers.

C. The Court's Jurisdiction to Join Indispensable Parties

The court of appeals' holding that the district court was powerless to join DHS as a defendant is inconsistent with the express language of the Judicial Improvement Act of 1990, 28 U.S.C. § 1367(a) ("Such supplemental jurisdiction shall include claims that involve joinder ... of additional parties."). While the district court did not base its decision to join DHS on Rule 19, its finding that implementation of the consent decree and protection of classmembers constitutional rights is impossible unless DHS is joined, makes it clear that the standards for joinder are satisfied. Under the liberal construction and flexibility of the rules of pleading, see Torres v. Oakland Scavenger Co., 487 U.S. 312, 316 (1988); Foman v. Davis, 371 U.S. 178 (1962), the court's decision to join DHS should have been affirmed.

Moreover, DHS was not entitled under

the federal rules to "defend the propriety of its actions in an independent suit where its actions were not prejudicial by the presence of extraneous claims or parties and an unrelated litigation history." 30 F.3d at 371. New parties may be joined at any time on such terms as are just. Rule 21, F.R.C.P. DHS received a full and fair adjudication of its rights and was entitled to no more. See Kremer v. Chemical Constr. Co., 456 U.S. 461, 480-81 (1981); Willner v. Budig, 848 F.2d 1032, 1034 (10th Cir. 1988) (per curiam), *cert. denied*, 488 U.S. 1031 (1989).

D. The Court's Authority To Invoke the All Writs Act

Once it was established that the district court had jurisdiction to enter a preliminary injunction either under the doctrine of supplemental jurisdiction or because violations of constitutional rights were established, the court had

authority under the All Writs Act to issue injunctions rendering effective its exercise of jurisdiction. United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). The power conferred by the Act extends to issuing injunctions against persons who, though not parties to the original action, may thwart the effectuation of the court's decision. *Id.*

Where unconstitutional conditions threaten the lives of classmembers, sufficiently exigent circumstances exist to justify an injunction requiring DHS to cooperate in efforts to preserve the lives of classmembers pending disposition of the case on the merits. See Benjamin v. Malcolm, 803 F.2d 46, 52-53 (2d Cir. 1986), *cert. denied* 480 U.S. 910 (1987); Alberti v. Sheriff of Harris County, Tex., 937 F.2d 984, 996 (5th Cir. 1991).

The court of appeals' decision renders the All Writs Act of no value in

complex civil rights cases resolved by consent decree. Plaintiffs may not establish the jurisdiction by showing that unforseen events violate classmembers constitutional rights. Third parties (here, DHS) who oppose the consent decree and actively seek to undermine its implementation, may not be joined in the litigation. This holding is inconsistent with the decisions of this court holding that the All Writs Act is to be applied flexibly to achieve the rational ends of law and Rule 21 of the Federal Rules of Civil Procedure, which provides that parties may be added or dropped at any stage of the proceedings.

The court's holding discourages the use of consent decrees in complex civil rights cases. It requires plaintiffs to file a new lawsuit every time a coordinate branch of state government chooses to ignore a consent decree. This is

apparently so even though the nonparty agency thwarting implementation is represented by the same law office[7] and would ordinarily be bound by the settlement of litigation by an agency with the same motivation to litigate. See United States v. IBT, 728 F. Supp. 1032, 1055 (S.D.N.Y. 1990), aff'd 907 F.2d 277 (2d Cir. 1970).

The decision encourages piece meal resolution of the many unforseen bureaucratic barriers that inevitably arise during implementation of institutional reform consent decrees. Federal courts will be deprived of the authority to assert jurisdiction over feuding governmental agencies to resolve

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[7]The consent decree was signed by Connecticut's Deputy Attorney General. Connecticut's statutory scheme provides that the Attorney General has "general supervision over all legal matters in which the state is an interested party." Conn. Gen. Stat. § 3-125. DMR and DHS are both represented by the Attorney General's Office.

unforseen obstacles. Plaintiffs will be reluctant to settle disputes unless every agency which might undermine the settlement is joined. Coordinate branches of government will be encouraged to ignore any court order rooted in a consent decree with which they do not agree. The well-recognized goal of settling civil rights cases so as to achieve voluntary compliance over a period of time is therefore undermined by the decision.

The decision establishes different rights to joinder depending on whether the case was resolved by consent or through adjudication. Joinder of nonparties will be available when necessary where there has been an adjudication,[8] but not in

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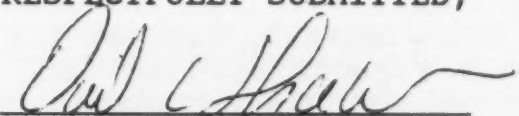
[8]Bradley v. Milliken, 484 F.2d 215, 221-224 (6th Cir. 1973), *reversed on other grounds*, 418 U.S. 717, 744-745 (1974); Reed v. Rhodes, 662 F.2d 1219, 1221 (6th Cir. 1981); Hart v. Community School Boards, 383 F. Supp. 699, 752-755 (E.D.N.Y. 1974); Bradley v. School Board of City of Richmond, 51 F.R.D. 139 (E.D. Va. 1970).

cases resolved by consent decree. In addition, the All Writs Act and Rules 19, 20 and 21 will be available to join nonparties who thwart or interfere with implementation of a court order based on adjudication on the merits, but not when the court order is based on a consent decree. These sharp distinctions are unnecessary and unwarranted, and will undermine the public interest in resolving complex institutional reform litigation through consent decrees.

II. CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

RESPECTFULLY SUBMITTED,



David C. Shaw, Esq.,
Counsel for Petitioner

No. _____

In The

Supreme Court Of The United States

October Term, 1994

THE ASSOCIATION FOR RETARDED CITIZENS OF CONNECTICUT, INC., ET AL.

Petitioner,

v.

GARETH THORNE, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1663—August Term 1993

(Argued May 4, 1994 Decided July 25, 1994)

Docket No. 93-9049

THE ASSOCIATION FOR RETARDED CITIZENS OF CONNECTICUT, INC., WILLIAM BRILLA, by his parents and next friends, Mr. and Mrs. Anthony Brilla, ANN MARIE OLENICK, by her mother and next friend, Mrs. Robert Olenick, MARIE JENNIE FORTIN, by her father and next friend, George Fortin, CHERYL EATON, by her mother and next friend, Ruth Eaton, ALLAN RICCARDI, by his mother and next friend, Helen Riccardi, DAVID MELI, by his mother and next friend, Alicia Meli, JOSEPH RITTLINGER, by his parents and next friends, Mr. and Mrs. Adam Rittlinger, GARY ROTONTO, STEPHEN OGREN, TINA SANDAHL, by her parents and next friends, Mr. and Mrs. Eric Sandahl, PHILIP TEITELMAN, by his parents and next friends, Mr. and Mrs. Samuel Teitelman, KRISTINA ARNOLD, by her parents and next friends, Mr. and Mrs. Theodore Arnold, LISA FRENCH, by her mother and next friend, Carolyn Bullard, STEPHEN BENSON, by his father and next friend, Robert Benson, MANSFIELD PARENTS ASSOCIATION,

Plaintiffs-Appellees,

GARETH THORNE, Commissioner Department of Mental Retardation, COMMISSIONER, Connecticut Department of Social Services, COMMISSIONER, Connecticut Department of Children & Families,

Defendants,

COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC HEALTH & ADDICTION SERVICES,

Defendant-Appellant,

NEW ENGLAND HEALTH CARE UNION, DISTRICT 1199,

Intervenor,

UNITED STATES OF AMERICA,

Litigating Amicus Curiae.

Before:

LUMBARD, ALTIMARI, and WALKER,
Circuit Judges.

Defendant-appellant the Commissioner of the Connecticut Department of Public Health & Addiction Services ("DHS") appeals from a judgment of the United States District Court for the District of Connecticut (Covello, *J.*), granting plaintiffs' motion to join DHS as a defendant in this action and issuing a preliminary injunction requiring DHS to abide by the terms of a previously-entered final order which restricted when "Do Not Resuscitate" orders may be placed in the medical files of mentally retarded patients.

Reversed.

DAVID C. SHAW, Esq., Hartford, CT, *for Plaintiffs-Appellees.*

HENRY A. SALTON, Ass't Attorney General, Hartford, CT (Richard Blumenthal, Attorney General for the State of Connecticut, Richard J. Lynch, Ass't Attorney General, Hartford, CT, of counsel), *for Defendant-Appellant.*

WALKER, *Circuit Judge*:

The Commissioner of the Connecticut Department of Public Health & Addiction Services, formerly known as the Department of Health Services (hereinafter "DHS"), appeals from a judgment of the United States District Court for the District of Connecticut (Alfred V. Covello, *Judge*), granting plaintiffs' motion to join DHS as a defendant in this action and issuing a preliminary injunction requiring DHS to abide by the terms of a previously-entered final order, in a proceeding to which DHS was not a party, which restricted when "Do Not Resuscitate" orders may be placed in the medical files of mentally retarded patients. While this case raises the significant issue of when "Do Not Resuscitate" orders should be prescribed for mentally retarded individuals, this appeal primarily concerns the propriety of adding a party to an action pursuant to the All Writs Act, 28 U.S.C. § 1651, after a final order has already been entered on the basis of

a consent decree and settlement agreements. We hold that it was improper for the district court to add DHS as a party to this case and accordingly reverse its order granting plaintiffs' joinder motion and issuing a preliminary injunction against DHS.

BACKGROUND

This lawsuit was filed in December 1978 by twelve individual plaintiffs and the Connecticut Association for Retarded Citizens in order to challenge the quality of care, living conditions, and residential placement of some 1200 mentally retarded individuals who either resided at the Mansfield Training School ("MTS") or who had been transferred from MTS to long-term care facilities. The named defendants included the Commissioners of the Department of Mental Retardation ("DMR"), the Department of Social Services, now known as the Department of Income Maintenance ("DIM"), and DHS.

In 1980, the district court certified a plaintiff class consisting of "all persons who reside at MTS or who may be transferred there in the future; retarded persons residing at home who are in jeopardy of being sent to MTS; and persons who have been transferred to skilled nursing facilities, intermediate care facilities, homes for the aged, and similar facilities yet remain Mansfield's responsibility." In 1982, the district court granted DHS's motion to be dismissed from the suit on the ground that it was not "essential to the Court's resolving the disputed issues in this litigation." Plaintiffs have never challenged this order.

On April 9, 1984, the magistrate judge to whom the case had been referred by the district court approved a consent decree entered into by the remaining parties

which provided for an interdisciplinary planning process through which the needs of each class member would be identified and addressed. The magistrate's order provided that he would oversee the implementation of the consent decree and would retain jurisdiction over any necessary future proceedings. In the years that followed, the parties continued to develop policies addressing the needs of class members; some of their settlement agreements were explicitly approved by the magistrate judge.

On November 14, 1990, the magistrate judge, with the agreement of the parties, issued a "Final Order" establishing a framework for the ultimate resolution of the case. The Final Order reiterates portions of the consent decree, but also includes new provisions relating to the numerous settlements entered into between 1984 and 1990. One of the new provisions, paragraph XI.J, pertains to the use of "Do Not Resuscitate" ("DNR") orders for class members. It provides in relevant part that:

> The DMR defendants shall continue to enforce and seek full implementation of the DMR Medical Advisory 87-2 (regarding withholding of cardiopulmonary resuscitation for terminally ill DMR clients) with respect to all classmembers.

The referenced Medical Advisory (the "Advisory") is a set of guidelines adopted by DMR in 1987. It provides that the use of DNR orders for a "client of [DMR] who lives in a facility operated or licensed by [DMR]" is appropriate only where the client's attending physician has determined that the client is terminally ill, has requested a second opinion regarding the client's terminal illness from a Connecticut licensed physician in the appropriate specialty, and has presented the client's full medical condition to the client and his or her surrogate for

their final approval regarding the use of DNR orders. The Advisory defines a terminally ill patient as one who has an incurable or irreversible medical condition and is considered by the physician to be within "days or weeks" of death. If a client's attending physician cannot state that the client may be expected to die within "days or weeks," the Advisory provides that the Commissioner of DMR, after consulting with the Connecticut Attorney General's Office and DMR's director of community services, will decide whether a particular DNR order is acceptable or further investigation is warranted.

On July 9, 1992, about two years after the Final Order had been entered, plaintiffs filed a motion to join DHS as a defendant and for a preliminary injunction requiring DHS along with DMR and DIM to implement the Advisory in all licensed health care facilities in the state. Plaintiffs asserted that many class members were transferred to health care facilities licensed by DHS, such as hospitals and nursing homes, which did not abide by the Advisory, and further, that DMR was unable to implement the Advisory in these facilities without DHS's cooperation. On February 12, 1993, the magistrate judge granted plaintiffs' motion regarding DMR and DIM and recommended granting plaintiffs' motions regarding DHS. The magistrate judge concluded that DHS should be joined as a party pursuant to the All Writs Act because it was "in a position to render the Final Order meaningless," and that, by not implementing the Advisory in its licensed facilities, DHS had violated the Final Order and the class members' constitutional due process rights. The district court adopted and affirmed the magistrate judge's recommended ruling without significant change. DHS subsequently filed this appeal.

DISCUSSION

The primary issue on this appeal concerns the validity of the district court's decision to join DHS to this litigation pursuant to the All Writs Act nearly two years after the Final Order was entered. We review this decision for an abuse of discretion. *See In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125, 1126 (1994).

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Supreme Court has consistently construed this Act to "authorize a federal court 'to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.' " *Pennsylvania Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 40 (1985) (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977)). "The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *New York Tel. Co.*, 434 U.S. at 174 (citations omitted).

In this case, the district court added DHS as a defendant after finding that DHS was "in a position to completely frustrate the implementation of the Final Order." The court reasoned that DMR claimed that it was powerless to enforce the Advisory in facilities licensed by DHS and

that DHS took the position that it did not have to comply with the Advisory because it was not a party to the litigation. Instead of abiding by the Advisory's procedures of writing DNR orders for class members only when an individual is within days or weeks of death and a second doctor has confirmed the terminal nature of the patient's illness, DHS follows the less restrictive policy of allowing DNR orders when requested by the patient upon entering a facility or when an attending physician determines that it is in the patient's best interests and has received consent from either the patient or the patient's surrogate decisionmaker. Given the impasse between two agencies of the same state, the district court ruled that "joinder of DHS is essential to ensure that the protections set forth in the Final Order for mentally retarded individuals who are in the care of the state are not forfeited in those cases when one state agency, DMR, chooses to place a class-member in a facility licensed by another state agency, DHS." The district court then proceeded to determine that DHS had violated the Final Order and was required to abide by it in the future.

We think these rulings constituted an abuse of the district court's discretion for the principal reason that the Final Order was entered based upon the consent of the parties and did not involve an adjudication on the merits. Where the district court exercises its jurisdiction to rule on the merits of a litigation, it determines that the law requires a certain outcome and is empowered to issue remedial orders to effectuate that outcome. By power of the All Writs Act, it may require the compliance of non-parties in order to ensure that its legally-mandated directives are not frustrated. In contrast, where a district court enters a privately-negotiated consent decree, it does not determine that the obligations assumed by the parties are

required by law. Indeed, consent decrees often impose rights and obligations greater than those required by law. *See Kindred v. Duckworth*, 9 F.3d 638, 641 (7th Cir. 1993). Because the terms of the consent decree were voluntarily assumed rather than legally imposed, there is no basis for extending the negotiated outcome to a nonparty. While a district court has authority to enforce a judicially-approved consent decree against the parties to it, a district court that enforces the decree against a nonparty acts beyond its jurisdiction and thus beyond the scope of the All Writs Act.

In this case, the Final Order evolved from a series of agreements among the parties regarding what kind of treatment the class members would receive in order to resolve their grievances; it did not establish that class members had a constitutional right to the services that DMR and DIM stipulated they would provide. The district court was therefore without authority to extend the agreement to DHS, a party that did not bargain for it or agree to it, simply on the ground that DHS's compliance would help the parties implement their settlement. "The All Writs Act is not a grant of plenary power to the federal courts. . . . It does not authorize a court to order a party to bear risks not otherwise demanded by law . . . ." *Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1289-90 (9th Cir. 1979).

We find it significant that the district court's decision adding DHS never discussed whether the joinder was necessary or appropriate under Rules 19 or 20 of the Federal Rules of Civil Procedure even though plaintiffs specifically moved under these Rules. We have serious doubts that Rules 19 and 20 would have permitted DHS's joinder even had the Final Order resulted from an adjudication on the merits, and are troubled that the district court cir-

cumvented an analysis of them by relying on its perceived powers under the All Writs Act. "Although [the All Writs Act] empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction*, 474 U.S. at 43.

In *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984), we recognized the inherent problem of enforcing a consent decree against a nonparty. In that case, we overturned a district court order requiring state officials to take action to implement a consent judgment entered into between plaintiff inmates and county officials to alleviate overcrowding in a county prison. We held that relief should not have been ordered against the state officials because, *inter alia*, they had neither agreed to any provisions respecting the inmates at the county jail nor received a ruling that they had violated the inmates' constitutional rights. We observed that "[t]he judgment 'resolved' the constitutional issues only in the sense that most consent judgments resolve disputes: It obviated any need to determine whether the claims of constitutional violation were established by substituting for an adjudication of those claims a contractual agreement between the signatories enforceable as a judgment of the District Court upon the Court's approval of the agreement and entry of a judgment." *Id.* at 899. We concluded that "[i]f the plaintiffs have constitutional claims against the State defendants, they remain free to pursue such claims," but that ordering relief against them on the present record was inappropriate and premature. *Id.* at 901.

In this case, as in *Badgley*, the district court improperly ordered relief against a defendant based on a consent judgment to which it was not a party. The only difference

between *Badgley* and this case is that once the district court joined DHS to this litigation, it proceeded to rule that DHS had violated class members' due process rights. However, plaintiffs' reliance on this determination for the purpose of keeping DHS in the case is misplaced. Because the district court improperly joined DHS in the first place, it lacked jurisdiction to determine whether DHS committed any constitutional violations and its constitutional ruling must therefore be vacated. DHS is entitled to defend the propriety of its actions in an independent suit where it is not prejudiced by the presence of extraneous claims or parties and an unrelated litigation history.

The problem with plaintiffs' position in this case becomes apparent when we compare *Badgley* with *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 480 U.S. 910 (1987). In *Benjamin*, the district court added state officials as third-party defendants in a prison crowding case and ordered them to accept custody of "state-ready" prisoners housed in city correctional facilities. The final judgment in *Benjamin* was based on a stipulation between prisoners and city officials that admitted that the conditions at the city prison were unconstitutional; in addition, the district court explicitly ruled that "the presence of the State officials as parties in the case was essential to assure protection of the plaintiffs' adjudicated constitutional rights." *Id.* at 50. We thus held in *Benjamin* that *Badgley* was "clearly distinguishable from the present suit where there has been an adjudication of unconstitutionality and the State officials have been joined as third-party defendants allegedly contributing to and implementing that violation of the Constitution." *Id.* at 52. The critical distinction to be drawn from a comparison of these cases, then, is whether the original judgment involves an adjudication of constitutionality. Where

it does, the district court can utilize its power under the All Writs Act to require nonparties not to frustrate its remedial orders. But, where the judgment is based solely on a consent decree, it generally cannot be enforced against third parties.

Our numerous decisions in the *United States v. IBT* litigation are fully consistent with our current holding. In that litigation, we had several opportunities to explore the reach of the All Writs Act as to nonparties in an ongoing litigation concerning the implementation of a consent decree between the government and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") aimed at ridding the union of organized crime influence. *See, e.g., United States v. IBT*, 968 F.2d 1506 (2d Cir. 1992) ("*Independent Committees*"); *United States v. IBT*, 968 F.2d 1472 (2d Cir. 1992) ("*Commercial Carriers*"); *United States v. IBT*, 964 F.2d 180 (2d Cir. 1992) ("*Pension Fund Trustee*"); *United States v. IBT*, 948 F.2d 98 (2d Cir.) ("*Yellow Freight*"), *vacated with directions to dismiss as moot*, 113 S. Ct. 31 (1992); *United States v. IBT*, 931 F.2d 177 (2d Cir. 1991) ("*Electoral Rules Decision*"); *United States v. IBT*, 907 F.2d 277 (2d Cir. 1990). In the earliest of these cases, we affirmed a district court order issued pursuant to the All Writs Act restraining all members and affiliates of the IBT from instituting suit challenging the consent decree in any jurisdiction except the Southern District of New York. 907 F.2d at 279. We observed that the injunction was necessary to prevent duplicative and inconsistent litigation and "to protect the district court's jurisdiction over the parties to the Consent Decree quite apart from any binding effect that the Decree may have on affiliates." *Id.* at 280.

In the *Electoral Rules Decision*, we recognized the general rule that consent judgments should not be enforced against nonparties. We stated:

> It is true that, for purposes of interpretation, a consent decree is treated as a contract among the settling parties, *Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), and that the terms of a consent decree cannot be enforced against those who are not parties to the settlement. *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989).

931 F.2d at 185. However, based on an exception to the rule where the interests of nonparties have been adequately represented by parties to the consent decree, we upheld a district court order binding various IBT-affiliated joint councils and locals to the consent decree insofar as the election of IBT officers was concerned since these affiliates derived their authority from the hierarchical IBT association and were adequately represented by the IBT when the consent decree was negotiated. *Id.* at 185-86. *Cf. United States v. IBT* ("*Friedman & Hughes*"), 905 F.2d 610, 622 (2d Cir. 1990) (union member could be bound by terms of consent decree agreed to by the IBT which delegated certain powers under the IBT Constitution to court-appointed officers). The exception we relied upon is not applicable in this case because none of the parties to the Consent Decree ever purported to represent DHS or its interests. Quite to the contrary, DHS had been dismissed from the litigation by order of the court.

Yellow Freight involved a scenario closer to the present case but found it unnecessary to resolve the question we have answered today. In that decision, we reviewed a district court order directing a nonparty employer to permit

union employees to campaign for office on its premises. The employer appealed based on the distinction we rely on above, namely "that a consent decree, as distinguished from a judgment resulting from litigation pursued to completion, cannot be enforced against a nonparty." 948 F.2d at 103. Our opinion did not reach the merits of this argument because of the limited nature of the court's order:

> Whatever the force of this argument, it is unavailing in this case because the district court has not purported to deem Yellow Freight bound by the Consent Decree. Instead, it has ruled that an order may issue under the All Writs Act to effectuate the Decree.

Id. Here, in contrast, the district court deemed DHS bound by the Final Order and, further, held DHS to be in violation of the Order's terms and ordered its future compliance with the provisions of the Advisory.

Our other *IBT* decisions are equally consonant with our current decision. If anything, they show a decided tendency to restrain the district court's exercise of its powers under the All Writs Act. *See, e.g., Independent Committees*, 968 F.2d at 1512 (reversing district court ruling extending consent decree to independent entities, noting that extension reflected a desire to implement "personal notions of union democracy and fair play" not warranted by any applicable law); *Commercial Carriers*, 968 F.2d at 1477 (invalidating application of consent decree to nonparty because it was not "agreeable to the usages and principles of law"); *Pension Fund Trustee*, 964 F.2d at 185 (vacating district court order imposing retrospective money obligation on trustee of pension fund). Our review of these cases reinforces our conclusion that the district court's order in this case was not a proper exercise of its jurisdiction.

CONCLUSION

Although not presented for our direct review, we are sensitive to the complex host of issues raised in this case. On the one hand, plaintiffs and DMR stress the need to protect mentally retarded persons from adverse medical decisions being made on their behalf, and potentially being made because of their retardation. On the other hand, DHS maintains that compliance with the Advisory is not mandated by the Constitution and would actually violate patients' rights to refuse medical treatment. Our decision expresses no opinion on these matters. We conclude only that the district court's decision to add DHS to this suit after a final consent judgment had already been entered was not authorized by the All Writs Act. Our decision does nothing to foreclose future litigation of the important issues at stake in this case.

For the foregoing reasons, we reverse the district court's decision adopting the recommended ruling of the magistrate judge.

(1483)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CONNECTICUT ASSOCIATION FOR RETARDED CITIZENS, INC.,	:	(filed 2/12/93)
Plaintiff,	:	CIVIL ACTION NO. H-78-653 (JAC)
v.	:	
GARETH THORNE, et al.,	:	(rec'd 2/17/93)
Defendants.	:	

RULING ON MOTION FOR PRELIMINARY INJUNCTION AND RECOMMENDED RULING ON MOTION TO JOIN THIRD-PARTY DEFENDANT

The plaintiffs in this civil action have moved for a preliminary injunction against the Commissioners of the Connecticut Department of Mental Retardation ("DMR"), the Connecticut Department of Health Services ("DHS") and the Connecticut Department of Income Maintenance ("DIM"). By their motion for preliminary injunction, the plaintiffs

seek to enjoin the above-mentioned state agencies to "take such actions as are necessary to adopt and implement DMR Medical Advisory # 87-2 and Paragraph XI-J of this court's Final Order of November 14, 1990".

Since DHS is not presently a party to this action, the plaintiffs have also moved to join DHS as a defendant pursuant to Rules 19 and 20 of the Federal Rules of Civil Procedure and pursuant to the All Writs Act, 28 U.S.C. §1651(a). For the following reasons, the plaintiffs' motion for preliminary injunction motion to join are hereby granted.

I. Statement of the Facts

A. Procedural Background

This action was filed in December 1978 by the Connecticut Association for Retarded Citizens ("CARC"), a group of

parents and advocates of mentally retarded individuals living in Connecticut. CARC challenged the care provided, the inadequate living conditions and the residential placement of the mentally retarded individuals who were residing at the Mansfield Training School and those individuals who had been transferred from the Mansfield Training School to long-term care facilities.[1]

In February 1980, the court issued an order allowing the plaintiffs to maintain the case as a class action. The parties consented to proceed before a United States Magistrate Judge pursuant to 28 U.S.C. 636, therefore, on May 6, 1983, the case was referred to Magistrate Judge F. Owen Eagan for all proceedings, including

[1]At its peak of operations in the 1960's, the Mansfield Training School housed approximately 1,870 persons.

trial and the entry of judgment.

On April 9, 1984, the court approved a Consent Decree which was executed by the parties following six days of trial on the merits of the case. According to the terms of the Consent Decree, DMR and DIM agreed to overhaul what was at the time an antiquated and inadequate system for serving the mentally retarded in the state. Under the supervision of the court, the provisions of the Consent Decree were implemented. In November of 1990, this court, in an attempt to establish a framework for the final resolution of this action, issued its "Final Order".[2]

[2]The court contemplated the need to retain jurisdiction over this matter in order to effectuate and oversee the implementation of the Final Order. Final Order, Section XIII, Subsection C provides: "The court shall retain jurisdiction over this matter for all purposes. The referenced of this action to F.

B. Findings of Fact

The Final Order provides, in pertinent part, that "the DMR defendants shall continue to enforce and seek full implementation of DMR Medical Advisory # 87-2 (regarding withholding of cardiopulmonary resuscitation for terminally ill DMR clients) with respect to all class members." Final Order, Section XI, Subsection I. The present dispute arises out of the provisions of the Final Order pertaining to the withholding of cardiopulmonary resuscitation ("CPR").

DMR Medical Advisory # 87-2 addresses the withholding of CPR from DMR clients. The medical directive to withhold CPR is

Owen Eagan, United States Magistrate Judge, ... shall continue for the purpose of effectuating this order and any further proceedings herein.".

known as a "Do Not Resuscitate Order" or a "No Code Order". Pursuant to Medical Advisory # 87-2, a patient's attending physician may place a Do Not Resuscitate Order in a medical file when that patient is deemed in a "terminal condition" and when the physician determines that the institution of CPR "would only postpone the moment of death for a brief period and would not be in the best interests of the patient."

A patient is deemed in a "terminal condition" under Medical Advisory # 87-2 when he or she is in "the final stage of an incurable or irreversible medical condition which, in the opinion of the attending physician, will result in death." Medical Advisory # 87-2 further provides that: "[f]or the purpose of this medical advisory, the duration of the

'final stage' is considered to be days or weeks." When the attending physician determines that a patient is in a terminal condition and believes that a Do Not Resuscitate Order is appropriate, Medical Advisory # 87-2 requires that, upon request from a DMR director, the physician must seek a second opinion from a specialist in order to confirm the diagnosis. The attending physician is further directed to discuss the propriety of the Do Not Resuscitate Order with the patient or the patient's surrogate. If a physician believes a Do Not Resuscitate Order is appropriate, but cannot state that the patient is in a terminal condition within the meaning of the guidelines, Medical Advisory # 87-2 requires that certain procedural safeguards be followed, including the

notification of the Attorney General.

Cardiopulmonary resuscitation is a unique medical procedure in that it is routinely administered without patient consent. Most hospital policies call for the initiation of CPR unless the patient has specifically refused it.[3] Dr. Joel Zaretsky, a DHS licensed physician, testified that he typically will initiate CPR on a patient who is not terminally ill unless a Do Not Resuscitate Order is present in that patient's medical file.

Dr. Zaretsky was uncertain who possessed the authority to consent to a Do

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[3]Rather than opposing this motion with medical testimony, DHS requested that the court review medical journals which it submitted on September 30, 1992. This finding of fact is based upon medical journals submitted by DHS describing the risks and benefits of CPR, specifically, Alvin H. Moss, Informing the Patient about Cardiopulmonary Resuscitation: When the Risks Outweigh the Benefits, 4 JOURNAL OF GENERAL INTERNAL MEDICINE 349 (July/August 1989).

Not Resuscitate Order or to place such an order in a patient's medical file. Dr. Zaretsky believes it is essential that there be uniform guidelines regarding the use of Do Not Resuscitate Orders.

The confusion surrounding Do Not Resuscitate Orders is not limited to questions of authority. Medical care providers who testified in this action also interpreted the scope and effect of Do Not Resuscitate Orders in significantly different ways. To some providers, a Do Not Resuscitate Order mandates the withholding of all affirmative treatment in the event of respiratory or cardiac arrest. It is the policy of at least one nursing home in the state not to transfer a patient to the hospital in the event of respiratory or cardiac distress if that patient is the subject of a Do Not

Resuscitate Order.

In addition to evidence setting forth the general DMR and DHS policies regarding Do Not Resuscitate Orders, the plaintiffs presented testimony and affidavits pertaining to the improper use of Do Not Resuscitate Orders in the medical files of specific classmembers.

Charles Carlson

Charles Carlson is a 59 year old male who is a classmember in this litigation. Mr. Carlson has been diagnosed with mental retardation associated with Down's Syndrome. Mr. Carlson lived in a DMR group home from 1984 through August 1992, and he was verbal, independent and carried out an active life.

In the spring of 1992, Mr. Carlson began to experience loss of memory and loss of self care skills. The medical

consensus was that he was experiencing Alzheimer's typed dementia. In August of 1992, he was transferred to a DHS licensed nursing home. The nursing home medical records prepared by his physician, Joseph Vinciterio, M.D., notes Mr. Carlson's diagnosis as: MR 319 00 and progressive dementia 094.1, possibly of Alzheimer's type.

Mr. Carlson's advocate, James McGaughey, does not believe there is any basis for claiming Mr. Carlson is terminally ill.[4] Mr. Carlson's chart, however, indicates that "Charles is terminal". The nursing home has not

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[4]In accordance with the Final Order, it is DMR's policy that each DMR client have the opportunity to be represented by an advocate. Advocates are chosen, if possible by the client, or by a family member or guardian, or in the alternative DMR will attempt to obtain advocates for its clients.

obtained the opinion of a second physician as to whether Mr. Carlson has a terminal illness as required by Medical Advisory # 87-2, nor is there clear indication in the chart as to the basis for such a determination.

A Do Not Resuscitate Order was placed in Mr. Carlson's medical file by Dr. Vinciterio on August 29, 1992, as a result of a conversation with Mr. Carlson's sister and guardian, Dorothy Child. According to the nursing home, a Do Not Resuscitate Order means use of antibiotics and IV/fluids, but no CPR in the event of a medical emergency.

The Office of Protection and Advocacy entered the case in early September and, based on a conversation with Mrs. Child established that she did not want a Do Not Resuscitate Order in Mr. Carlson's file,

but also that she did not want "heroic" measures taken. The Do Not Resuscitate Order was removed from Mr. Carlson's chart in early September following a conversation between the director of nursing at the nursing home and Rachel Pride, Mr. Carlson's advocate. A subsequent conversation between the director of nursing and Mrs. Child resulted in the reinstatement of the Do Not Resuscitate Order. That order remained in Mr. Carlson's file until September 18, 1992 when a DMR nurse intervened and the order was removed. At no time during these events was a complaint filed with DHS, and DHS has not investigated these events.

Gail Johnson

The death of one classmember in particular, Gail Johnson, illustrates the

confusion surrounding the use of Do Not Resuscitate Orders and the potential for unfortunate results. Gail Johnson was a fifty-five year old woman diagnosed with Down's Syndrome who was a DMR client and a classmember in the present action. Gail Johnson's retardation rendered her unable to consent to legal decisions, however, she was not in a "persistent vegetative state" and she was fully aware of her surroundings. Gail Johnson was legally blind, and was diagnosed with aspiration pneumonia and Alzheimer's disease. Gail Johnson's attending physician, Dr. Joel Zaretsky, did not believe she was in a terminal condition.

In May 1992, the probate court appointed Deborah Kern as Gail Johnson's legal guardian. Ms. Kern had never met Ms. Johnson prior to April 1992, and Ms.

Kern was not related to Gail Johnson. At the time Deborah Kern was appointed her guardian, Gail Johnson was in poor health and often had difficulty breathing due to the presence of mucous in her trachea.

In early June 1992, Ms. Johnson was admitted to Griffin Hospital because of her respiratory problems. While she resided at Griffin Hospital, Dominic Thomas, an attorney who had represented Gail Johnson during the probate hearing at which Ms. Kern was appointed guardian, requested that a probate hearing be held to determine the propriety of a Do Not Resuscitate Order in Gail's file. Following a hearing in chambers, the probate judge issued a letter stating that he did not believe he possessed the authority to enter an order permitting a Do Not Resuscitate Order. At the urging

of Mr. Thomas, Dr. Zaretsky, nevertheless, placed a Do Not Resuscitate Order in Gail Johnson's file. Ms. Johnson remained subject to the Do Not Resuscitate Order while she remained at Griffin Hospital.[5]

In August of 1992, Ms. Kern consented to Gail Johnson's transfer from Griffin Hospital to the Silver Springs Nursing Center ("Silver Springs"), a nursing home licensed by DHS. Shortly after her transfer to Silver Springs, Ms. Johnson experienced further respiratory difficulty, and she was transferred to the Veteran's Memorial Hospital ("Veteran's Memorial") which is also licensed by DHS. Gail Johnson's attending physician at that time contacted Ms. Kern and recommended

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[5]This Do Not Resuscitate Order applied only while Gail Johnson remained at Griffin Hospital because a Do Not Resuscitate Order does not follow a patient from one facility to another.

that a Do Not Resuscitate Order be placed in her file at Veteran's Memorial. Ms. Kern consented to a Do Not Resuscitate Order only for the stay at Veteran's Memorial, and at that time Ms. Kern emphasized that in the event of a mucous plug, Gail Johnson should be suctioned.

Ms. Johnson was subsequently released from Veteran's Memorial, and she was transferred back to Silver Springs. Following further respiratory complications, she was again transferred back to the hospital. She spent approximately one week at Veteran's Memorial, and was again transferred back to Silver Springs.

On the night of September 26, 1992, Gail Johnson experienced further respiratory distress. Since the duty nurse at Silver Springs believed that Ms.

Johnson was under a Do Not Resuscitate Order, the nurse telephoned the attending physician seeking permission to send her to the hospital.[6] The attending physician had last examined Ms. Johnson two days prior to this phone call, however, the duty nurse did not receive permission to transport her to the hospital. Gail Johnson was not transferred to the hospital, and shortly thereafter she died of respiratory failure.

Representatives of the nursing home acknowledged significant confusion as to whether Gail Johnson was subject to a Do Not Resuscitate Order at Silver Springs. Upon a review of its records, Silver Springs found that Gail Johnson was not

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[6]Silver Spring's policy was that a patient subject to a Do Not Resuscitate Order could not be transferred to the hospital without a doctor's permission.

under a Do Not Resuscitate Order and that Ms. Kern had not consented to such an order at Silver Springs.

Margaret Hall

Margaret Hall was a 48 year old retarded woman. Ms. Hall's attending physician placed a Do Not Resuscitate Order in her medical file at a time when she was neither in a terminal condition, nor was she comatose. The physician's opinion was based, in part, upon her mental retardation. Ms. Hall's doctor stated: "she remains severely retarded with a CT scan that shows little normal brain tissue. Furthermore, she lives a bed-to-chair, total care existence with no hope of improvement. Based on her overall condition and significant medical problems, her father would like a DNR Order. I totally agree, and view his

request as very appropriate."

Ms. Hall's father was very active in her life, and he acted as her guardian. Although his daughter was not in a terminal condition, Mr. Hall consented to a Do Not Resuscitate Order in his daughter's medical file. Ms. Hall's advocate attempted to change Mr. Hall's and the physician's stance regarding the Do Not Resuscitate Order, however, the advocate was unsuccessful. The Do Not Resuscitate Order remained in Ms. Hall's file for over one year while she was not diagnosed as "terminal".

Subsequently, Ms. Hall was diagnosed with liver cancer. At that point the advocate did not believe the Do Not Resuscitate Order was inappropriate, and his efforts to remove the order ceased. Ms. Hall passed away on July 12, 1992.

Albert Wyka

Albert Wyka is a 66 year old mildly retarded individual who has been diagnosed with juvenile diabetes. Although Mr. Wyka is blind and he has a hearing impairment, in no way could he be considered "terminal". He is presently housed in a DHS licensed nursing home.

Mr. Wyka has a medical guardian, however, the guardian is unrelated to him. Following a stroke, Mr. Wyka was admitted to the Gardner Heights Nursing Home for rehabilitation. A Do Not Resuscitate Order was placed in Mr. Wyka's medical file seventeen days after being admitted to the nursing home despite the fact that he was only admitted to the home for rehabilitation and despite the fact that he was not "terminal". Mr. Wyka's advocate and his treating nurses have

attempted to have the medical directive removed from his file, however, they have been unsuccessful in their efforts.

"K.P", "C.C." and "E.S"

The plaintiffs set forth evidence surrounding the placement of Do Not Resuscitate Orders in the files of three other classmembers. In one of those cases, after a hearing before the Hartford probate court to determine the propriety of a Do Not Resuscitate Order, classmember "K.P." was found competent to consent to the order. With respect to "C.C" and "E.S.", the court finds that those classmembers were subject to Do Not Resuscitate Orders while they were housed in DHS licensed facilities and while they were not considered terminal. In those cases, the safeguards set forth in Medical Advisory # 87-2 were not followed.

II. Discussion

A. Joinder of the Connecticut Department of Health Services

The plaintiffs now have moved for a preliminary injunction against the defendants DMR and DIM, and against DHS, claiming that the state agencies have refused to ensure the implementation of Medical Advisory # 87-2 in violation of the Final Order and the Due Process Clause of the Fourteenth Amendment. DHS was not a party to the Final Order, however, the plaintiffs claim that the All Writs Act, 28 U.S.C. §1651(a), gives this court the power to join DHS as a party and to issue the relief requested in its motion for preliminary injunction.

The All Writs Act, 28 U.S.C. §1651(a), provides that a federal court "may issue all writs necessary or appropriate in aid of their respective

jurisdictions and agreeable to the usages and principles of law." A federal court has the power to issue such orders that "may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." United States v. New York Telephone Company, 434 U.S. 159, 172 (1977). The court's power under the All Writs Act reaches to all persons who are in a position to frustrate the implementation of a court order, including those persons who are not parties to the original action. New York Telephone Company, 434 U.S. at 174; United States v. International Brotherhood of Teamsters, etc., 968 F.2d 1506, 1512 (2d Cir. 1992). The court's power even extends to parties who have not engaged in any affirmative

conduct to frustrate such a court order, but rather, are merely in a position to frustrate the order of the court. New York Telephone Company, 434 U.S. at 174.

The plaintiffs in this action claim that DHS has actively frustrated the implementation of Medical Advisory # 87-2, therefore, DHS must be joined as a party to the motion for preliminary injunction. Based upon the testimony presented by the plaintiff, the court agrees that DHS must be joined in this case.

During the four days of hearings on the pending motion, both DHS and DMR were represented by the Attorney General for the State of Connecticut, and both state agencies were given an opportunity to rebut the plaintiffs' claims. Neither DHS nor DMR aggressively disputed the fact that Do Not Resuscitate Orders that

violated the safeguards set out in the Final Order were present in the files of classmembers in DHS licensed facilities.[7] Rather, DHS maintained the position that it was not a party to the action, therefore, this court could not enforce the terms of the Final Order against it.

The evidence presented reveals that DHS is in a position to completely frustrate the implementation of the Final Order. DHS claims it is not obligated to comply with the Final Order because it is not a party to this litigation. DMR, on the other hand, claims that it is powerless to enforce the Final Order when DMR transfers a classmember to a facility licensed by DHS because DMR claims it has no control over physicians or the

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[7]In fact, DMR has filed no written opposition to the motion as required by Local Rule 9(a)(1).

facilities licensed by DHS. The result of this state agency inaction is that the protections of the Final Order apply to classmembers while they are housed in DMR group homes, but are ignored when DMR transfers a classmember to a DHS nursing home or hospital.

This court can not sanction such a result. DHS is in a position to render the Final Order meaningless because virtually every classmember will be transferred, by DMR, into a facility licensed by DHS at some point in their lives. The court finds that joinder of DHS is essential to ensure that the protections set forth in the Final Order for mentally retarded individuals who are in the care of the state are not forfeited in those cases when one state agency, DMR, chooses to place a classmember in a

facility licensed by another state agency, DHS. To rule otherwise would be to permit DMR to circumvent the protections set forth in the Final Order.

B. Plaintiffs' Motion for Preliminary Injunction

Although the court finds it essential that DHS be joined as a party to this action, it still must be determined whether the plaintiffs are entitled to the relief they seek. The plaintiffs' claim for relief is based upon two separate grounds - 1) that the defendant state agencies have violated the Final Order, and 2) that the defendant state agencies have violated the Due Process Clause of the Fourteenth Amendment. For the following reasons, the court finds that the plaintiffs have succeed in proving both grounds for relief.

1. Preliminary Injunction Standard

The standard for obtaining a preliminary injunction in the Second Circuit is well established. The moving party must demonstrate "a) irreparable harm, and b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping decidedly in the movant's favor. Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979); U.S.A. Network v. Jones Intercable, Inc., 704 F.Supp. 488, 491 (S.D.N.Y. 1989).

In this action, it cannot be disputed that in the absence of the requested relief, the plaintiffs may suffer irreparable harm. Some classmembers subject to Do Not Resuscitate Orders may experience respiratory or cardiac failure

without receiving the benefit of CPR.[8] Although the use of CPR may not necessarily succeed in extending the life of an individual, the withholding of CPR takes away any possibility that the patient's life will be extended. The denial of that possibility of life constitutes irreparable harm.

2. Violation of the Final Order

The plaintiffs have also proven that they are entitled to relief because they have proven that they are likely to succeed on the merits of their claims. The court hereby finds that DMR has violated the portions of the Final Order pertaining to the withholding of CPR in facilities licensed by DHS. Furthermore, the court finds that DHS is also

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[8]In fact, classmember Gail Johnson's death occurred during the pendency of this motion.

responsible for the failure to implement the provisions of the Final Order.

The Final Order incorporates Medical Advisory # 87-2 which sets forth the policy that: "The Department of Mental Retardation (DMR) expects the same quality of medical care for the clients under its aegis as that provided to non-retarded individuals." Medical Advisory # 87-2 is entitled "WITHHOLDING CARDIOPULMONARY RESUSCITATION OF TERMINALLY ILL DMR CLIENTS Guidelines for Regional and Training School Directors and Physicians who provide care to DMR Clients". Medical Advisory # 87-2, and thus the Final Order, prohibits the placement of Do Not Resuscitate Orders in the files of patients who are not terminally ill unless certain procedural safeguards are followed.

After a careful review of all the evidence presented in this case, the court finds that the plaintiffs have proven that the defendant state agencies have violated Medical Advisory #87-2 and the Final Order. Although DMR has essentially complied with the Final Order when classmembers are housed in DMR run group homes or facilities, the situation is drastically different when DMR places a client in a DHS licensed facility. The evidence reveals that in those facilities that are licensed by DHS, the protections of the Final Order vanish. DHS ignores the existence of Medical Advisory # 87-2, and additionally has made no effort to make the providers that it licenses aware of the existence of the Final Order. Furthermore, DMR washes its hands of the problem by claiming that it cannot control

the actions of DHS or the physicians and facilities DHS licenses. DMR should not be able to avoid its obligations under the Final Order, and DHS, contrary to its position in this case, should not be able to flagrantly disregard the protections set forth in the Final Order.

3. Due Process Violation

In further support of their motion for preliminary injunction, the plaintiffs claim that the failure of DHS and DMR to adopt uniform procedures surrounding the use of Do Not Resuscitate Orders will deprive classmembers of necessary life saving medical treatment in violation of the Due Process Clause of the Fourteenth Amendment. See, Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990). In this case, the critical medical decision to refuse potentially

beneficial medical treatment is often made by a surrogate decision maker on behalf of an incompetent individual under the care of the state without adherence to any procedural safeguards to determine whether the decision reflects the wishes of the patient. The plaintiffs claim that the failure to adhere to any uniform procedural safeguards to ensure that the decision would reflect the wishes of the patient violates the Due Process Clause.

DHS, on the other hand, denies that it has violated the constitutional rights of any classmembers, and rather, claims that the enforcement of the provisions in the Final Order regarding the withholding of CPR would violate the classmembers' right to refuse treatment which is set forth in Cruzan. DHS claims that the plaintiffs have misinterpreted Cruzan.

DHS contends that Cruzan stands only for the proposition that a state may constitutionally require procedural safeguards that limit a person's right to refuse medical treatment.

DHS claims that compliance with the Final Order would prevent a mentally retarded individual, who may never have been competent to make medical decisions, from ever exercising his or her right to refuse medical treatment. This court does not agree with the defendant. DHS is correct that the holding in Cruzan was limited to the issue whether Missouri's procedural safeguards violated the right to refuse treatment. The Supreme Court, however, also clearly stated that "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-

sustaining medical treatment." Cruzan, at 261.[9]

The Fourteenth Amendment provides that no person shall be deprived of "life, liberty, or property, without due process of law." The Supreme Court has recognized

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[9]Curiously the Attorney General, in fact the same Assistant Attorney General representing DHS in this case, took the opposite position in the seminal case in Connecticut regarding the withdrawal of life support, McConnell v. Beverly Enterprises-Connecticut, Inc., 209 Conn. 692, 553 A.2d 596 (1989). In McConnell, the trial court found clear and convincing evidence that Carol McConnell, who had been injured in an automobile accident, did not wish to be kept alive by life support systems. Mrs. McConnell had been a head nurse in an emergency room, and she had often stated her views that she did not want to be kept alive by extraordinary means. In addition, Mrs. McConnell's family consented to the removal of a feeding tube. Nevertheless, the Attorney General argued in that case that the state's compelling interest in preventing suicide should outweigh the right to refuse treatment. In this case, which involves a mentally retarded individual, the Attorney General has inexplicably chosen to ignore those important state interests.

that a person who is competent has a constitutionally protected liberty interest to refuse unwanted medical treatments as well as a constitutional interest in life. If a state is to permissibly interfere with those interests, the constitutional interests must be balanced against the opposing relevant state interests. Cruzan, at 278-79.

The issue in Cruzan was whether a state could permissibly interfere with an individual's right to refuse treatment by requiring clear and convincing proof that the individual had chosen, or would have chosen if they were able, to refuse to receive the benefit of extraordinary treatment. When that difficult choice is thrust into the hands of a substitute decision maker, most states, including

Missouri, insist that certain procedural safeguards must be met to determine whether the surrogate's decision would reflect the incompetent person's decision.[10]

Cruzan only addressed whether the degree of proof required by the state violated Nancy Cruzan's right to refuse treatment. The Court balanced that right against the state interests in preserving life, preventing suicide and the interest in avoiding making decisions about the quality of a life of a particular individual. The Court held that

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[10]The Connecticut legislature also has enacted statutory safeguards to determine whether a decision to terminate life support complies with the intent of the patient. See, Conn.Gen.Stat. §19a-570 et seq.; McConnell, 209 Conn. at 692. Although the issue is not before this court, it is highly likely that the state agencies have violated state law in this case.

Missouri's procedural safeguards, which required clear and convincing proof that the surrogate decision maker's choice reflected Nancy Cruzan's choice, did not violate her right to refuse treatment. Cruzan, at 286-87.

The novel issue raised in this case by the present motion is whether it is constitutionally permissible for two state agencies to participate in life and death medical decisions without adhering to any procedural safeguards to ensure that the decision would reflect the wishes of the patient. The concept that such a crucial medical decision must comply with a patient's wishes is based upon the basic right of self determination. The fundamental right of self determination mandates that no court, government or entity should substitute its judgment as

to what is an acceptable quality of life for another. "[D]espite its pitfalls and inevitable uncertainties, the inquiry must always be narrowed to the patient's expressed intent." In re Westchester County Medical Center on behalf of O'Connor, 531 N.E.2d 607, 613, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988).

Implicit in the statutes and cases addressing the withdrawal of life support is the presumption that a person would accept treatment. This presumption is based upon the notion that the consequences of an erroneous decision that did not comply with the wished of the patient weigh heavily in favor of presuming that a person would choose to accept treatment. "An erroneous decision not to terminate results in a maintenance of the status quo....or simply the death

of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction." Cruzan, at 19.

In the present case, not only does this court find that the Final Order does not unconstitutionally interfere with the classmembers' right to refuse treatment, this court believes that the defendant state agencies have violated the classmembers' right to life. It is important to note that this case does not involve the removal of life support systems from individuals who are comatose or who are in a persistent vegetative state, nor does it involve the use of

extraordinary measures to keep such individuals alive. Instead, this case involves medical directives that are placed in patients' medical files prior to the onset of a terminal illness by a physician. The directives mandate the withholding of a routinely used medical procedure that possibly could save an individual's life. As a result of these medical orders, no affirmative action is taken when a patient experiences respiratory or cardiac distress. The evidence in this case reveals that these medical directives are often placed in the files of incompetent individuals by surrogate decision makers who have no relation to the patients and who are often appointed by the state. These decisions are being made without adherence to any procedural safeguards to determine whether

such orders would comply with the patients' wishes. The court has found that the decision to place such orders in the classmembers' medical files is often based, in part, upon the individuals' mental retardation.

This court does not question the constitutionality of surrogates making important medical decisions for incompetent patients. However, the problem with the conduct of the defendants in this case is that, in the facilities licensed by DHS, decisions are made by doctors licensed by the state and guardians appointed by the state that result in the withholding of potentially beneficial treatment without adherence to any mechanism or uniform procedural safeguards to determine whether the decisions comply with the wishes of the

patients.

DMR may or may not ever learn of the placement of a Do Not Resuscitate Order in a classmember's file. When DMR, the state agency responsible for the care and treatment of these classmembers, is made aware that a Do Not Resuscitate Order has been mistakenly or improperly placed in a classmember's file, that agency takes virtually no action to remedy the situation. Either no process is in place to correct the situation, or if such a process is in place, DMR takes no action because it claims it has no authority. DHS, on the other hand, claims simply that it need not comply with the process.

Especially troubling is the fact that the important state interests implicated in cases of this nature, such as the state's interest in preserving life and

preventing suicide, and the individuals right to life, have curiously been ignored by both DMR and DHS in this case involving retarded individuals. These individuals are subject to the care and custody of DHS and DMR, however, those state agencies fail to even acknowledge these individuals' right to life. DHS's failure to advocate the usual state interests that are implicated in cases of this nature is particularly noteworthy in light of its position in McConnell.

Both state agencies evoked testimony that when a classmember has passed away, the state has a process in place, through the medical quality assurance board, to review the medical providers' conduct following the death of a classmember. This after the fact review simply does not cure the Due Process violation.

The probate court also does not provide an acceptable forum for review. As the testimony in this action revealed, these orders are originally placed in medical files without resorting to the courts to determine whether they are proper. Only after a Do Not Resuscitate Order is questioned by another provider or advocate does the possibility of review arise. These orders, thus, may remain in a file indefinitely until someone who is inclined to question their propriety is made aware of their existence. Even then, as the Gail Johnson case illustrates, it is not entirely clear whether the probate court has jurisdiction to review these orders.

The court does agree with DHS that, in those situations when a classmember has never been competent, and thus, has never

been able to express his or her intent regarding life sustaining treatment, that individual may never be able to exercise his or her right to refuse treatment. In these situations, however, the right to life must outweigh the right to refuse treatment. The consequences of a decision to withhold treatment that would contradict the wishes of the classmember mandate such a result because the court believes that if an erroneous decision is made, it is better to err on the side of preserving life.

III. Conclusion

For the foregoing reasons, the court hereby grants the plaintiffs' motions to join (Documents ## 1459, 1464) and hereby grants the plaintiffs' motion for preliminary injunction (Document #1461).

The significant confusion over the

existence and scope of Do Not Resuscitate Orders and the confusion surrounding the question of who has authority to make such a decision cannot continue. As Dr. Zaretsky indicated, there is a need to establish uniform guidelines to clarify this difficult issue for medical care providers.

After hearing on the plaintiffs' motion for preliminary injunction, it is hereby ORDERED that:

1) The Commissioners of the Connecticut Departments of Mental Retardation, Health Services and Income Maintenance shall take all necessary and appropriate actions to implement DMR Medical Advisory # 87-2 as interpreted by this court for all classmembers with all deliberate speed, including, but not limited to, publication of Medical

Advisory #87-2 to all providers of medical care to any classmember;

2) That the Commissioners of DMR, DHS and DIM shall submit a plan to implement DMR Medical Advisory # 87-2 for all classmembers who are housed in facilities licensed by DHS and by DMR within 45 days of this order. An amended or alternative Medical Advisory may be implemented subject to the approval of this court.

DMR and DIM consented to trial and judgment before a United States Magistrate Judge in this case, therefore, this court's order, as it applies to DMR and DIM, shall be treated as a ruling from the district court. Since DHS did not execute the consent form, however, the ruling on the motion to join and the ruling on the motion for preliminary injunction, as they

apply to DHS, shall be treated as recommended rulings.

Any objections by DHS to the recommended rulings must be filed with the Clerk of Courts within ten (10) days of the receipt of this order. Failure to object within then (10) days may preclude appellate review. See, 28 U.S.C. § 636(b)(1); Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; Small v. Secretary of H.H.S., 892 F.2d 15, 16 (2d Cir. 1989).

Dated at Hartford, Connecticut this 11th day of February 1993.

\s\ F. Owen Eagan
F. Owen Eagan
United States
Magistrate Judge

APPENDIX 3

STATE OF CONNECTICUT
DEPARTMENT OF MENTAL RETARDATION

MEDICAL ADVISORY #87-2
(21 December 1987)

Revised 22 May 1989

WITHHOLDING CARDIOPULMONARY RESUSCITATION OF TERMINALLY ILL DMR CLIENTS

Guidelines for Regional and Training School Directors and Physicians who provide care to DMR clients

The Department of Mental Retardation (DMR) expects the same quality of medical care for the clients under its aegis as that provided to non-retarded individuals. Connecticut and federal laws state that persons with mental retardation must not be discriminated against with regard to medical practice.

A client who lives in a facility operated or licensed by the department and suffers from a terminal illness may reach a point where cardiopulmonary resuscitation (CPR) after cessation of

respiration and cardiac function would be unwarranted. A competent adult has the right to direct that CPR be withheld in the event of cardiorespiratory arrest when the underlying medical prognosis is considered hopeless. The same decision can be made for a legally incompetent patient by his or her surrogate, governed by the standards of good medical and legal practice. A surrogate may be a guardian, a conservator of the person, next of kin or other close relative.

Withholding cardiopulmonary resuscitation under the direction of the attending physician does not in and of itself violate any criminal or civil Connecticut law, providing that necessary client safeguards are scrupulously followed. A medical order to withhold cardiopulmonary resuscitation is known as

a "do not resuscitate" or "no code" order.

The terminally ill patient is one who is considered to be in a "terminal condition". Connecticut General Statutes define a "terminal condition" as "the final stage of an incurable or irreversible medical condition which, in the opinion of the attending physician, will result in death" [Section 19a-570(3)]. For the purpose of this medical advisory, the duration of the "final stage" is considered to be days or weeks.

For a person who is terminally ill, the physician may determine that resuscitation would be of no benefit to the patient because the natural course of the patient's medical condition would result imminently in death and the institution of resuscitative measures, if

successful, would only postpone the moment of death for a brief period and would not be in the best interest of the patient.

For the purpose of this advisory, cardiopulmonary resuscitation may be withheld from a terminally ill client after respiration and cardiac function have ceased spontaneously, as a natural progression of the dying process. However, it should be clearly understood that a client who aspirates food or fluid, or has any other accident that may result in death if left unattended, shall receive treatment necessary to preserve his or her life, regardless of the presence of a "do not resuscitate" order.

When the terminally ill client is competent and alert and understands the implications of the diagnosis and prognosis, the "do not resuscitate"

decision should be reached by the client after discussion with the physician primarily responsible for his or her care. When the terminally ill client is incapable of making an informed decision, the decision may be made by the client's surrogate after consultation with the client's physician. Should the surrogate disagree with the "do not resuscitate" order, no such order shall be given.

The individual responsible to determine the propriety of a "do not resuscitate" order in a particular case is the senior attending physician in charge of the patient's care, not a house officer or resident.

It is important to understand that a "do not resuscitate" order is compatible with maximal therapeutic efforts, short of resuscitation, and that the patient is

entitled to receive vigorous support in all other therapeutic modalities, even though a "do not resuscitate" order may have been written.

When the director of a region or training school learns that a "do not resuscitate" order is contemplated or in effect for a client of the department who lives in a facility operated of licensed by the department, that director shall ask the client's attending physician to verify that the following expectations have been met:

1. The client's attending physician has examined the client, ordered appropriate tests and studies, and determined that the client is terminally ill according to the criteria stated in this advisory.

2. The attending physician

requested a second opinion from a Connecticut licensed physician in the appropriate specialty that confirms the client's terminal illness.

3. The attending physician then presented the full medical condition of the client to the client (taking into account the level of understanding of the client) and to the surrogate for their final decision regarding the use of resuscitation in case of a cardiorespiratory arrest.

If a regional or training school director is uncertain about the appropriateness of a "do not resuscitate" order, the DMR regional health services coordinator or DMR physician shall evaluate the situation and inform the director whether the three procedures

outlined above have been accomplished. Consultation from the director of community medical services should be sought.

Neither the commissioner nor any employee of the Department of Mental Retardation has the legal authority to grant permission for a "do not resuscitate" or "no code" order for any client. This permission must be obtained in the manner described above. The department's role is to assure that neither the client's retardation nor level of retardation prior to his or her medical difficulty is considered in the decision to issue a "do not resuscitate" order.

If the attending physician renders an opinion that the client is in the final stage of an incurable or irreversible medical condition that will result in

death, to justify a "do not resuscitate" order, but cannot state that the client may be expected to expire during the next several days or weeks, the regional or training school director, or his or her designee, must inform the department's director of community medical services, who will alert the commissioner and the Attorney General's Office. Following consultation with the director of community medical services, a representative from the Attorney General's Office, and others, the commissioner will decide that (1) the particular "do not resuscitate" order is a medically acceptable decision or (2) further investigation is warranted.

After the commissioner determines that a "do not resuscitate" order is appropriate in a particular case and the

foregoing requirements have been met, the order must be written into the patient's medical record by the attending physician, and not by a house officer or resident. A "do not resuscitate" order may be rescinded at any time by the physician, and must be rescinded at the specific request of the client or the client's surrogate.

\s\ Sherwin Mellins, M.D.
Sherwin Mellins, M.D. Director
Community Medical Services

APPENDIX 4

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT ASSOCIATION FOR RETARDED CITIZENS	:	CIV. NO. H-78-653 (TEC)
v.	:	
GARETH THORNE, ET AL	:	JULY 9, 1992

MOTION FOR PRELIMINARY INJUNCTION AND FOR FURTHER ORDERS

The plaintiffs move for a preliminary injunction and for further orders to enjoin the Connecticut Departments of Mental Retardation, Health Services and Income Maintenance to take such actions as are necessary to adopt and implement Department of Mental Retardation (DMR) Medical Advisory #87-2 and Paragraph XI-J of the District Court's Final Order of November 14, 1990 regarding the use of "Do Not Resuscitate" (DNR) orders on classmembers who are not in the "final stage of an incurable or irreversible medical condition which, in the opinion of

the attending physician, will result in death."

In support of this motion the plaintiffs represent that DNR orders have been placed in the files of classmembers G.J., A.W. and M.H. by their attending physicians, that none of these individuals are terminally ill as defined in Medical Advisory #87-2 and none have the mental capacity to make an informed choice about whether they should be deprived of emergency medical care in the event of a medical emergency.

The plaintiffs further represent that unless uniform standards are adopted and implemented by the Connecticut Departments of Mental Retardation, Health Services and Income Maintenance, classmembers will be deprived of necessary and life saving medical care in the event of a medical

emergency, in violation of the Final Order, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid, to the following counsel of record on July 9, 1992:

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stamp: Received Jul 16 1992
Attorney General's Office

Filed
Jul 14 1 29 am '92

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT ASSOCIATION FOR RETARDED CITIZENS	:	CIV. NO. H-78-653 (TEC)
v.	:	
GARETH THORNE, ET AL	:	JULY 9, 1992

ORDER TO SHOW CAUSE

A Motion For Order to Show Cause having been presented to the court by David C. Shaw, Esq., and, it appearing from the representations made in the motion that the motion should be granted, it is hereby: ORDERED

That the plaintiffs serve copies of their Motion for a Preliminary Injunction and Further Orders, on the Commissioner of the Department of Health Services on or

before July 17, 1992, and that the said Commissioner show cause at a hearing to be held on July 23, 1992 at 2:00 p.m. Hartford, Ct. why the plaintiffs' Motion should not be granted.

BY THE COURT,

\s\ F. Owen Eagan
F. Owen Eagan
United States
Magistrate
7/10/92

APPENDIX 6

1491

stamp: Received Aug 26
Attorney General's Office

Filed
Mar 22 - D.Johnson

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT ASSOCIATION FOR RETARDED CITIZENS	:	CIV. NO. H-78-653 (AVC)
v.	:	
GARETH THORNE, ET AL	:	MARCH 9, 1993

2:78CV653 8/24/93. (Doc. No. 1491) The objection to the Magistrate Judge's recommended ruling (document no. 1483) is overruled. The court, therefore, adopts, ratifies, and affirms the recommended ruling subject to the following conditions. The Commissioners of the Connecticut Department of Mental Retardation and Health Services shall take all necessary and appropriate actions to implement DMR Medical Advisory # 87-2 (or

any advisory or legislation that develops or follows from it) as interpreted by this court for all classmembers with all deliberate speed, including, but not limited to, publication of Medical Advisory # 87-2 to all providers of medical care to any classmember. To the extent that the Commissioners of DMR and DHS have not submitted a plan to implement DMR Medical Advisory # 87-2 (or any advisory or legislation that develops or follows from it) for all classmembers who are housed in facilities licensed by DHS and by DMR, the Magistrate Judge shall hold a hearing on the plaintiff's motion for contempt (document nos. 1516 and 1517) by November 1, 1993. Any conference on this matter shall be held before the Magistrate Judge.

\s\ Alfred V. Covello
Alfred V. Covello, U.S.D.J.

APPENDIX 7

STATUTES AND REGULATIONS

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 U.S.C. § 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise

by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

Conn. Gen. Stat. § 17a-238

§ 17a-238. Rights of persons under supervision of commissioner of mental retardation

(g) The commissioner's oversight and monitoring of the medical care of persons placed or treated under the direction of the commissioner does not include the authority to make treatment decisions, except in limited circumstances in accordance with statutory procedures. In the exercise of such oversight and monitoring responsibilities the commissioner shall not impede or seek to impede a properly executed medical order to withhold cardiopulmonary resuscitation.

For purposes of this subsection a "properly executed medical order to withhold cardiopulmonary resuscitation" means (1) a written order by the attending physician; (2) in consultation and with the consent of the patient or a person authorized by law; (3) when the attending physician is of the opinion that the patient is in a terminal condition, as defined in subsection (3) of section 19a-570, which condition will result in death within days or weeks; and (4) when such physician has requested and obtained a second opinion from a Connecticut licensed physician in the appropriate specialty that confirms the patient's terminal condition. A "properly executed medical order to withhold cardiopulmonary resuscitation" also includes the entry of such an order when the attending physician

is of the opinion that the patient is in the final stage of a terminal condition but cannot state that the patient may be expected to expire during the next several days or weeks, or, in consultation with a physician qualified to make a neurological diagnosis, deems the patient to be permanently unconscious, provided the commissioner has reviewed the decision with the department's director of community medical services, the family and guardian of the patient and others who the commissioner deems appropriate, and determines that the order is a medically acceptable decision.

Conn. Gen. Stat. § 19a-571

§ 19a-571. Liability re removal of life support system of incapacitated patient. Consideration of wishes of patient.

(a) Subject to the provisions of subsection (c) of this section, any

physician licensed under chapter 370 or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding or removal, provided (1) the decision to withhold or remove such life support system is based on the best medical judgment of the attending physician in accordance with the usual and customary standards of medical practice; (2) the attending physician deems the patient to be in a terminal condition or, in consultation with a physician qualified to make a neurological diagnosis who has examined the patient, deems the patient to be permanently unconscious; and (3) the attending physician has considered the

patient's wishes concerning the withholding or withdrawal of life support systems. In the determination of the wishes of the patient, the attending physician shall consider the wishes as expressed by a document executed in accordance with section 19a-575, if any such document is presented to, or in the possession of, the attending physician at the time the decision to withhold or terminate a life support system is made. If the wishes of the patient have not been expressed in a living will the attending physician shall determine the wishes of the patient by consulting any statement made by the patient directly to the attending physician and, if available, the patient's health care agent, the patient's next of kin, the patient's legal guardian or conservator, if any, and any other

person to whom the patient has communicated his wishes, if the attending physician has knowledge of such person. All persons acting on behalf of the patient shall act in good faith. If the attending physician does not deem the incapacitated patient to be in a terminal condition or permanently unconscious, beneficial medical treatment including nutrition and hydration must be provided.

(b) A physician qualified to make a neurological diagnosis who is consulted by the attending physician pursuant to subdivision (2) of subsection (a) of this section shall not be liable for damages or subject to criminal prosecution for any determination made in accordance with the usual and customary standards of medical practice.

(c) In the case of an infant, as defined

in 45 C.F.R. 1340.15(b), the physician or licensed medical facility shall comply with the provisions of C.F.R. 1340.15(b)(2) in addition to the provisions of subsection (a) of this section.